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No. 82-1367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROADWAY EXPRESS, INC.,

Petitioner,

v.

LAWRENCE G. WARREN,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR CERTIORARI

Alfred B. Adams, III
(Counsel of Record)
GREENE, BUCKLEY, DeRIEUX
& JONES
1515 Peachtree Center South
225 Peachtree Street, N.W.
Post Office Box 57006
Atlanta, Georgia 30343
(404) 522-3541
Counsel for Roadway Express, Inc.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Roadway Express, Inc., filing this supplemental brief in support of petition for certiorari, states that:

This is its second Designation of Corporate Relationships. The Designation that was filed originally on February 14, 1983 is currently accurate.

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ARGUMENT AND CITATION OF AUTHORITY

On February 14, 1983 Roadway Express, Inc. filed its petition for certiorari herein. Among the contentions of Roadway Express in support of its petition for certiorari are that respondent Lawrence G. Warren made an irrevocable election to proceed under the workers' compensation law of Tennessee, the state in which he first received workers' compensation benefits, and that the Full Faith and Credit Clause of the United States Constitution (U.S. Const. art. IV, § 1) requires that the Georgia Board of Workers' Compensation give full faith and credit to this prior award of compensation in Tennessee. Additionally, Roadway Express, Inc. contended in its petition for cer-

tiorari that the balancing of interests test advocated by the plurality opinion of *Thomas v. Washington Gas Light Company*, 448 U.S. 261, 100 S.Ct. 2647, 65 L.Ed.2d 757 (1980), when applied to the facts of the instant case, indicates that Tennessee has a greater interest in application of its law than Georgia has in ignoring Tennessee's irrevocable election doctrine.

Since the filing of its petition for certiorari, Roadway Express, Inc. has received an unpublished order in the case of *Roadway Express, Inc. v. Lawrence G. Warren*, No. H 79-490 (N.D. Ind. Feb. 9, 1983). This is an order entered by the Federal District Judge for the Northern District of Indiana granting Roadway Express, Inc.'s motion for summary judgment in an action for subrogation to recover workers' compensation benefits paid under Tennessee law from the tortfeasor responsible for the accident which is the subjnect of Mr. Warren's workers' compensation claims in Tennessee and Georgia. In its order the District Court holds that Tennessee has a more significant relationship to the case than Indiana or Georgia. The District Court also holds in its order that Mr. Warren made a legally binding election to accept benefits under Tennessee law. Copy of this order is set forth in the Appendix to this supplemental brief, *infra*.

Roadway Express, Inc. respectfully submits that this order provides further support for its contention that the Full Faith and Credit Clause of the United States Constitution barred the Georgia Board of Workers' Compensation from granting a second award of workers' compensation benefits to respondent Lawrence G. Warren. Accordingly, Roadway Express, Inc. requests the Court to review this order in connection with its consideration of this petition for a writ of certiorari.

GREENE, BUCKLEY, DeRIEUX
& JONES

By: _____
Alfred B. Adams III
Attorneys for Petitioner
for Certiorari
Roadway Express, Inc.

1515 Peachtree Center South
225 Peachtree Street, N.E.
Post Office Box 57006
Atlanta, Georgia 30343
(404) 522-35341

APPENDIX

UNITED STATES DISTRICT COURT
NORTHER DISTRICT OF INDIANA
HAMMOND DIVISION

ROADWAY EXPRESS, INC.)
Intervenor-Plaintiff) Civil No. H 79-490
)
v.)
)
LAWRENCE G. WARREN, *et al,*)
Cross-Defendants)

Filed
Feb 09 1983
Richard E. Timmons, Clerk
U.S. District Court
Northern District of Indiana

ORDER

This matter is before the Court on the following motions:

1) Plaintiff's Motion to Dismiss, filed on April 1, 1982;

2) Intervening plaintiff's Motion for Summary Judgment, filed on December 24, 1981.

Plaintiff's Motion to Dismiss is DENIED. intervening plaintiff's Motion for Summary Judgment is GRANTED.

The matters under consideration here were left under advisement by this Court in its order of September 23, 1982 pending the filing of briefs by the parties. Intervening plaintiff Roadway Express, Inc. (Roadway) filed its brief in a timely fashion. Plaintiffs Lawrence G. and Katheryn D. Warren filed their brief after the deadline set by this Court but the Court has considered it anyway. The Court has also considered Roadway's response, filed on November 12, 1982. In entering the following Order, the

Court incorporates by reference its Order of September 23, 1982.

MOTION TO DISMISS

Warren moves to dismiss Roadway's subrogation claim by arguing that the same issues presented here are also pending before state courts in Georgia and Tennessee. Warren's argument based on the principles of collateral estoppel was rejected in this Court's September 23rd Order. The Court reserved ruling on Warren's contention that this case should be stayed pending the outcome of the state cases. This argument is also without merit.

The Seventh Circuit has analyzed the circumstances under which a federal court should stay an action pending before it where the parties are involved in an identical case pending before a state court in three recent cases: *Evans Transportation Co. v. Scullin Steel Co.*, 693 F.2d 715 (7th Cir. 1982); *Voktas, Inc. v. Central Soya Company, Inc.*, 689 F.2d 103 (7th Cir. 1982); *Microsoftware Computer Systems v. Ontel Corp.*, 686 F.2d 531 (7th Cir. 1982). All of these decisions are based on principles set down in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). In the latter case, the Supreme Court held in part that where a federal court and a state court exercise concurrent jurisdiction over a case, the federal court may decline to exercise its jurisdictional powers for reasons of wise judicial administration where "exceptional circumstances" exist. *Id.* at 818. In the *Ontel* case, exceptional circumstances were found to exist where the state action was filed first; there was no peculiar federal interest in maintaining the case in federal court; the state could fully resolve all issues; the state court was more adept at interpreting state law. The *Voktas* court affirmed the trial

court's denial of a stay where the state action was stayed first and the state court expressed reluctance to deal with complicated issues involved in the case. Finally, in *Scullin*, the appellate court remanded the case to the district court for decision on the stay application noting several potential "exceptional circumstances": the state court action might be filed and under way a substantial period of time before the federal action is instituted; the applicable substantive law is that of a foreign jurisdiction; or the state forum may be more convenient. 693 F.2d at 720. Because the Seventh Circuit in *Ontel, Voktas* and *Scullin* went into some detail to describe the "exceptional circumstances" which might justify a federal stay under *Colorado River, those cases must be distinguished from the present case.*

The Ontel, Voktas and *Scullin* decisions must be distinguished here because there is no problem with concurrent jurisdiction between a state and federal court. In all three of the Seventh Circuit cases discussed above, identical actions were pending simultaneously before a state court and a federal court. That is not the situation here. The present case was initiated by Warren to recover damages from the defendant tortfeasor. The original action has been settled but it remains to be decided whether Roadway has a valid subrogation lien on the settlement proceeds. So far as this Court can determine, the Georgia action is merely a dispute as to the amount of supplemental workmen's compensation Warren may recover there and the issue of Roadway's subrogation lien under Tennessee law has not been questioned. Consequently, this action will not be stayed pending the outcome of the Georgia proceeding. The Tennessee case involves the question of what liability Roadway has to pay further workmen's compensation benefits to Warren under Tennessee law.

Although the issue of Roadway's subrogation lien could arise in the Tennessee proceeding, it would only arise as a collateral issue and it is clear that only this Court has the issue squarely before it. This Court will therefore not stay this action pending the outcome of the Tennessee proceeding.

Aside from Warren's argument that this action should be stayed pending the outcome of either the Georgia or the Tennessee proceeding, Warren also argues that this case should be dismissed because of the "prior suit pending" in Tennessee. *See Tallent v. Shevell,* 27 Tenn. App. 683, 184 S.W.2d 561 (1944). In *Shevell*, the Tennessee Court of Appeals held that where identical cases were filed in two separate county courts, the court which acquired jurisdiction first retained jurisdiction. Suffice it to say that as between federal and state courts, the mere fact that an action is first filed in a state court does not deprive a federal court of jurisdiction over an identical case. *See, e.g., Evans Transportation Co. v. Scullin*, 693 F.2d at 718. For these reasons, Warren's motion to dismiss Roadway's subrogation claim is denied.

MOTION FOR SUMMARY JUDGMENT

Before discussing the parties' summary judgment arguments, the Court must decide whether Indiana, Tennessee or Georgia law controls. A federal court in a diversity case must apply the choice of law rules of the forum state. *Day & Zimmerman, Inc. v. Challover*, 423 U.S. 3 (1975). In a case of this type, Indiana requires this Court to apply the law of the state with the "most significant relationship" to the facts involved. *Matteler v. J.A. Jones Constr. Co.*, 457 F.2d 917 (7th Cir. 1972); *Watts v. Pioneer Corn Company, Inc.*, 342 F.2d 617 (7th Cir. 1965). The undisputed facts of the present case show that

Warren was working out of Roadway's terminal in Tennessee at the time of the accident; that Roadway paid workmen's compensation benefits and Warren accepted those benefits under Tennessee law; and that Warren was a resident of Tennessee at the time of the accident. In light of those facts, Tennessee has a more significant relationship to this case than Indiana or Georgia. The Court recognizes that there is now some confusion as to whether Indiana still follows the "most significant relationship" test. *See Sharp v. Egler,* 658 F.2d 480 (7th Cir. 1981). Even so, in their supplemental briefs, both Warren and Roadway agree that Tennessee law is controlling. The Court therefore will apply Tennessee substantive law to the issues presented.

Having decided that Tennessee law controls here, the Court first looks at Roadway's request for summary judgment on its subrogation claim. The parties agree that Tennessee law grants an employer who pays workmen's compensation benefits to an employee a subrogation lien on any proceeds obtained by the employee from a third party tortfeasor. Tenn. Code Ann. § 50-914 (1977 Repl.). Warren, however, maintains that Roadway is not entitled to its statutory subrogation lien because Warren did not make an informed election to accept benefits under Tennessee law. Warren further argues that had he been properly informed of his options, he would have claimed benefits under Georgia law, which the parties agree does not provide for a subrogation lien. Inherent in Warren's position, then, is the argument that Roadway had an affirmative duty to inform him of his various options in claiming workmen's compensation. Warren's argument is without merit.

Warren has failed to show that an employer may be denied his subrogation lien under Tennessee law where an

employee can show that he did not make an informed election to receive Tennessee workmen's compensation. Warren cites absolutely no Tennessee law in support of this argument nor can the Court locate any. None of the cases cited by Warren are applicable to the issue presented.

Warren first cites *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980). In that case, the Supreme Court held that the Full Faith and Credit Clause of the United States Constitution does not prohibit a worker from seeking supplemental workmen's compensation benefits in a second state where he recovered benefits in the first state and where the second state would have had the power to apply its workmen's compensation laws in the first instance. *Id.* at 286. The Court in *Thomas* did not impose on employers the obligation to fully inform their employees of the various options available to them. The plurality based its decision to allow successive recoveries of workmen's compensation benefits in part on its recognition of the fact that

> Compensation proceedings are often initiated informally, without the advice of counsel, and without special attention to the choice of the most appropriate forum. Often the worker is still hospitalized when benefits are sought as was true in this case. And indeed, it is not always the injured worker who institutes the claim.

Id. at 284. A fair reading of the *Thomas* case does not lend support to Warren's argument that Roadway should be denied its subrogation lien.

Warren next cites *Thomas v. Transportation Insurance Co.*, ____ Tenn. ____, 532 S.W.2d 263 (1976). The issue presented in that case was whether an employee who received benefits under Arkansas law could then recover

further benefits under Tennessee law. The court found the question of whether the employee made a binding election to accept Arkansas workmen's compensation benefits to be determinative. A court could decide if such a binding election was made by looking at whether "the employee has taken any affirmative action to seek a recovery under the law of [the other state], or has voluntarily, deliberately and with full knowledge of his options, accepted benefits under [the other state's] law. . . ." 532 S.W. 2d at 267. This holding also does not apply to the case at hand. There is no question presented here as to whether Warren is entitled to supplemental benefits. Rather, the question is whether Roadway's subrogation lien should be upheld. The Tennessee court in *Transportation Insurance* was not presented with this question and hence, did not decide it. That case also does not support Warren's argument that Roadway is not entitled to its subrogation lien.

The final case cited by Warren is *True v. Amerail Corp.*, ____ Tenn. ____, 584 S.W.2d 794 (1979). That case, like *Transportation Insurance*, involved a worker who sought supplemental benefits in Tennessee after accepting benefits in another state. The *True* court held that, absent compelling considerations as in *Transportation Insurance*, supplemental workmen's compensation benefits could not be sought in Tennessee. 584 S.W.2d at 798. The *True* court did not address the issue of whether an employer could be denied its subrogation lien when it failed to inform an injured employee of his workmen's compensation options. As with *Transportation Insurance*, then, *True* supplies no foundation for Warren's argument that Roadway has no valid subrogation lien for the workmen's compensation benefits it paid to Warren under Tennessee law.

The Court realizes that the *Transportation Insurance* and *True* cases provide an interesting analysis for deciding whether an employee has made a binding election to accept workmen's compensation benefits. However, neither of those cases hold that where an employee has not made a binding election to accept Tennessee benefits, an employer who pays such benefits is not entitled its subrogation lien. Acceptance of Warren's argument would result in unnecessary delay in the payment of workmen's compensation benefits to injured workers, for it would require an employer to research all possible filing options for each and every injured employee. Warren's argument is also contrary to the legislative intent in allowing subrogation liens which is "to reimburse an employer for payments made under a workmen's compensation award from 'the net recovery' obtained by the employee. . . to the extent of the employer's total obligation under the Compensation Act." *Beam v. Maryland Casualty Co.*, ____ Tenn. ____, 477 S.W.2d 510, 513 (1972). The Court therefore finds that Roadway is entitled to a subrogation lien on the settlement proceeds of this case to the extent of the benefits it has paid to Warren as well as "a credit on any future liability, as it accrued to the extent the net recovery collected exceeds the amount paid by the employer." Tenn. Code Ann. § 50-914. The parties are hereby given thirty (30) days in which to provide this Court with information either by stipulation, affidavit or otherwise as to the amounts paid by Roadway to Warren under Tennessee workmen's compensation law, information as to Roadway's full maximum liability under that Act, and information as to the amount recovered by Warren in this action. If Roadway's maximum liability may not be determined until the Tennessee proceeding is concluded, the parties shall so inform the Court.

Roadway next requests that summary judgment be entered in its favor on the counterclaim filed by Warren. The thrust of Warren's counterclaim is that Roadway "seized upon" a doctor's statement which opined that Warren was not permanently disabled but was able to return to work and that, based on that report, Roadway ceased paying benefits to Warren. Warren maintains that Roadway's action was done in bad faith; that Roadway breached its duties to Warren who is a third party beneficiary of a contract between Roadway and the state of Tennessee; that Roadway committed a "tort of outrage" against Warren. None of Warren's claims preclude summary judgment in Roadway's favor.

In support of its summary judgment request, Roadway argues that Warren's claim is barred by the exclusivety provisions of the Tennessee workmen's compensation laws. The rights and remedies provided under the Tennessee workmen's compensation statutes are the exclusive remedies growing out of the injury. Tenn. Code Ann. § 50-908 (1977 Repl.). Where it is found that an employer has failed to settle a workmen's compensation claim in good faith, the Tennessee laws further provide for the imposition of an interest penalty. Tenn. Code. Ann. § 50-1005 (1982 Suppl). Thus, insofar as Warren claims that Roadway has acted in "bad faith", his claim is covered by § 50-1005. *Cf. Mayes v. Genesco, Inc.*, ____ Tenn. ____, 510 S.W.2d 882 (1974). With regard to Warren's third party beneficiary and "tort of outrage" claims, however, this Court need not determine whether such claims are excluded by Tennessee workmen's compensation laws. The Tennessee courts have not decided this question and it is noted that courts of other jurisdictions are split as to whether an employee may bring a damage action where an employer ceases to pay benefits. *See* 8

A.L.R. 4th 902 (1981). Rather than decide how Tennessee courts would rule on this question this Court finds that, assuming *arguendo* that Warren's claims are not excluded, he could not recover under either of the remaining theories.

Warren may not recover under his third party beneficiary theory. It is fundamental that one may not be a third party beneficiary to a contract where there is no contract. *See generally* Corbin *Contracts* § 882 *et seq.* (1951). Warren argues that a contract exists between Roadway and Tennessee for the establishment of workmen's compensation benefits. Warren has supplied no support for this argument, however. If any contract or implied contract exists, it is between Roadway as employer and Warren as employee. *See Smith v. Van Noy Interstate Co.*, 150 Tenn. 25, 262 S.W. 1048 (1924). Warren therefore cannot sue as a third party beneficiary.

Warren may also not recover under his "tort of outrage" theory. To recover under such a theory, the defendant's conduct must be "atrocious," "utterly intolerable" and "beyond all bounds of decency." *Goldfarb v. Baker,* ____ Tenn. ____, 547 S.W.2d 567 (1977). This Court does not find Warren's allegations that Roadway disputes Warren's entitlement to benefits based on a medical opinion to be conduct that is "atrocious", "utterly intolerable" or "beyond all bounds of decency." Roadway's request for summary judgment on Warren's counterclaim is well-taken.

JUDGMENT

It is therefore ORDERED that:

1) Warren's Motion to Dismiss is DENIED;

2) Roadway's Motion for Summary Judgment is GRANTED;

3) The parties are given thirty (30) days either to stipulate as to the extent of Roadway's subrogation lien or to supply this Court with all relevant information to make such a determination.

ENTER: February 3, 1983

JUDGE, UNITED STATES DISTRICT COURT